

HEARING DECISION

Petitioner: --- ----

Petitioner's Address: ----

Petitioner's Parents: --- & --- ----

Respondent: Scottsdale Unified School District
3811 N. 44th Street
Phoenix, AZ 85018

Respondent's Representative: James Martin, Attorney at Law

Petitioner's Representative: Lucy Keough, Attorney at Law

Impartial Hearing Officer: Harold J. Merkow
1102 W. Glendale Ave. #116
Phoenix, AZ 85021

Dates of Hearing: August 14, 15, 16, 2002

Date of Decision: October 22, 2002

IDENTITY KEY

Respondent School District ‘ Scottsdale Unified School District

Petitioner ‘ --- ----

Petitioner’s parents ‘ --- and --- ----

Elementary School ‘ --- Elementary School

District Alternative Elementary School ‘ ---

District Middle School ‘ --- Middle School

--- Assistant Principal ‘ ---

District Alternative Middle School/High School ‘ ---

District High School ‘ --- High School

--- High School Assistant Principal ‘ ---

Educational Diagnostician ‘ ---

Psychologist ‘ --- ----

Psychiatrist ‘ --- ----, M.D.

Scottsdale Unified School District Lead Psychologist ‘ Sylvia Cohen

Consultant/parents’ advocate ‘ Jill McCollum-Gahley

Alternative School Director ‘ ---

This matter came on for hearing on August 14, 15 and 16, 2002. The purpose of the hearing was to consider the due process hearing request of Petitioner's parents seeking to classify Petitioner eligible for special education services. Petitioner as well as Petitioner's parents appeared in person and were represented by Lucy Keough, Attorney at Law. Respondent School District was represented by James Martin, Attorney at Law.

Petitioner's parents are seeking a due process hearing to have the Respondent School District recognize Petitioner's disabilities and have Petitioner declared eligible for special education services. Having heard testimony of the witnesses, having read and considered the exhibits admitted into evidence, having read and considered the parties' written arguments and being fully advised in the premises, the undersigned hearing officer now makes the following findings of fact and conclusions of law and enters the following decision.

FINDINGS OF FACT

1. Petitioner is currently a 10th grade male student who attends school in the Respondent School District. Petitioner has attended school in the Respondent School District for elementary, middle and high school.

2. Several years ago, Petitioner was medically diagnosed as having bipolar disorder and attention deficit hyperactivity disorder (ADHD). Petitioner currently

takes Effexor and Zyprexa for his bipolar disorder and these medications are believed by Petitioner's psychiatrist to cause the fewest side effects. Although a stimulant medication has been tried for Petitioner's ADHD condition, Petitioner's reaction to the medication was atypical and the medication was discontinued. At present, Petitioner does not take any medication for his ADHD condition. Among the bipolar disorder medication side effects shown by Petitioner are sedation, including difficulty remaining awake and alert, diminished motivation, cognitive slowing, concentration problems, memory problems, headache, dizziness and nausea. Although the medications help control Petitioner's bipolar disorder, Petitioner continues to cycle through states from depression to euphoria and back again.

3. Among the educational effects of Petitioner's illnesses have been tardiness to school, sleeping in class, failing to complete homework assignments, failure to turn in assignments, inattention, lack of understanding about assignments, low test scores and sometimes poor grades. Despite having problems in his schoolwork, Petitioner has been described by his teachers as polite, respectful, he participates in class and he gets along well with his peers.

4. Petitioner has always been an average student in school. He was passed through all grades from the time he enrolled in the Respondent School District. While Petitioner was a 6th grade student, Petitioner's mother became concerned about Petitioner's performance in school because, for the following 7th grade school year, Petitioner would be attending middle school and he would move from room to room

instead of having one teacher for all of his classes. As the 6th grade term progressed, Petitioner became depressed with ~~amoping~~ mood swings. His pediatrician placed him on a low dose of Paxil but, by the end of the school year, Petitioner had stopped trying in school and he would not accept help from his mother. Petitioner was passed from the 6th grade to the 7th grade.

5. Petitioner's mother requested a conference with school staff about her concerns regarding Petitioner's progress in school. Petitioner's mother met with school staff on October 18, 1999 and an agreement was reached that a conference would be convened to discuss what interventions would be necessary to help Petitioner. On the day following her meeting with the school staff, Petitioner's mother wrote to the school staff, thanking them for meeting with her. She wrote ~~AI~~ was pleased with the genuine caring that seemed to take place during our conference today. It has been an uphill battle trying to find a reason for my son's lack of academic ability. However...we may finally be able to pinpoint what my son's problem is. I truly appreciate the quick response in getting a date of Monday, October 25, 1999 to have a Student Study Team meeting. I cannot begin to tell you what a comfort it is to get help with this situation. I fully support what options the school has to offer me at this time and request that a full testing evaluation be done on Petitioner [name deleted]. I would hate for him to fall through the cracks and become something less than what he is capable of becoming. He has a wonderful heart, and I am thankful that others have taken time to care. Your teachers and staff

have given me hope that Petitioner [name deleted] is not just a number in a sea of students@.

6. The Respondent School District has a process where, if a student is identified as having learning problems, he is referred to a Student Study Team, which is composed of teachers, administrators, parents and other professionals to design interventions, which will improve the student's learning abilities. These interventions may take the form of accommodations for the student; the interventions may require some testing or the Student Study Team may seek a full evaluation for special education. The Student Study Team regularly reviews the interventions it creates to decide whether the interventions are working and/or whether further steps are necessary for additional accommodations, testing or evaluation. The Student Study Team does not immediately begin with a full evaluation for consideration of special education when a student is identified with learning problems.

7. The Student Study Team at the Respondent School District middle school met on October 25, 1999 to discuss appropriate interventions for Petitioner. The Team decided that Petitioner's logs would be monitored, that Petitioner's assignment agenda book would be monitored by Petitioner's parent daily and that one of Petitioner's teachers would meet with Petitioner three times each week for 30 minutes after school for one-to-one homework assignments. The plan further called for the science and social study teachers to sign Petitioner's assignment book. Petitioner was also expected to take his classroom notes in bullet form. The Student

Study Team expected to meet again on December 8, 1999 to review the interventions put in place on October 25.

8. Throughout the remainder of the first semester of the 7th grade, Petitioner's emotional state was deteriorating at a rapid pace and his medications were not controlling his symptoms. When the December 8 review date was approaching, Petitioner's mother contacted the Assistant Principal at the middle school and told her that the family needed to stabilize Petitioner's medications before continuing with the Student Study Team intervention plan. The Student Study Team did not meet on December 8, 1999 and no further interventions were put into place for Petitioner.

9. During the second semester of his 7th grade, Petitioner's emotional state deteriorated further, he was using illegal drugs and he was hospitalized at St. Luke's Hospital on February 14, 2000.

10. Petitioner was evaluated by an educational specialist and a clinical psychologist in March 2000. Petitioner's mother was concerned about Petitioner's difficulty focusing on tasks at hand and lack of interest in schoolwork. She was particularly concerned that Petitioner was verbally abusive and had some self-destructive behavior. The evaluation was arranged by Petitioner's mother because she had been told by the Assistant Principal that, if the school arranged an evaluation, the time for conducting such an evaluation could be months away.

11. Petitioner's intellect was tested and Petitioner scored in the average range. The evaluators noted that Petitioner [name deleted] is a pleasant and

friendly 13-year old youngster who is right-hand dominant and uses a mature pencil grasp of his pencil. He demonstrated no primary difficulties with auditory or visual acuity and seems to work fairly persistently throughout the testing session. Petitioner [name deleted] responded quickly to a majority of items but did require repetition of several items, suggesting difficulties in terms of his short-term or working memory. He also had many responses which were '>nearly' correct, suggesting a good global understanding of the conceptual level of material present, but difficulties with the specific or detail level of his answers@. When Petitioner was tested, the psychologist noted AIndividual subtest analysis suggested a relatively even pattern of cognitive abilities, with no specific areas of information processing strengths or weaknesses. On tasks requiring working memory, Petitioner [name deleted] did perform somewhat more poorly than on tasks which did not have a heavy memory component, and as noted above, Petitioner [name deleted] often has the '>gist' of a concept even if he is unable to come up with the specific answer required on the problem. Overall, there are no indications of significant strengths or weaknesses in Petitioner's [name deleted] profile, and he is felt to have an average ability level@. The evaluators assessed Petitioner's personality screening as Athe obtained clinical profile had multiple elevations, with both internalizing and externalizing problem scales elevated to a clinical degree. Petitioner's [name deleted] overall profile was not statistically correlated with any of the standardization profile types, however, and it appears that he has a combination of difficulties, which include attention problems,

feelings of anxiety and depression, as well as oppositional and defiant behavior, with his scores on measures of conduct disturbance reaching a clinical level of significance. A review of Petitioner's [name deleted] history indicates that he has had a prior psychiatric hospitalization for depression, suicidal ideation, and drug utilization. He has had a long history of academic challenges, however, which would not appear to be caused by a specific learning disability. Alternatively, it is felt that Petitioner [name deleted] may in fact meet diagnostic criteria for an Attention-Deficit/Hyperactivity Disorder, which is not currently being treated from a medication standpoint. The evaluators concluded that Petitioner's educational evaluation showed A...that Petitioner [name deleted] has age and grade appropriate skills in sight-word identification, but falls below grade level expected skills in comprehension of reading material. In application of math skills, he appears to have some emerging math skills, but has difficulty remembering how to use these steps in application or story problems. His spelling, capitalization, and punctuation is equal to the 22nd percentile. Challenges were noted in writing samples with mechanics, grammar and flow of language. In the general area of Science, he appears to have more recall of information and this is followed by the area of Humanities.

12. The evaluators recommended A1) Petitioner's [name deleted] psychiatrist is encouraged to consider the potentially additive value of a stimulant medication, in addition to Petitioner's [name deleted] anti-depressant/mood control medications; 2) Petitioner [name deleted] should continue to have therapy with [name deleted] to

address the emotional issues he faces; 3) Petitioner [name deleted] may benefit from specific education in strategies to improve his short-term memory. He will need to learn strategies in note taking, preparing for tests and the use of color-coding to trigger memory recall for notes and facts; 4) support from a personal tutor or tutor group will be important. No recommendations for special education were made by the evaluators.

13. At about the same time, Petitioner's mother scheduled an appointment for Petitioner with a psychiatrist and Petitioner met the psychiatrist in April 2000. The psychiatrist reviewed Petitioner's past medical history, Petitioner's past medication history and Petitioner's symptoms. The psychiatrist diagnosed Petitioner with bipolar disorder and ADHD-combined type. The psychiatrist prescribed Effexor XR and Zyprexa for Petitioner's bipolar condition.

14. Petitioner was absent from school for approximately three weeks from the time of his hospitalization and, when he returned to the middle school, he continued to struggle with his schoolwork which resulted in some grades being below average and other grades average. The teachers and administrators felt that Petitioner was not trying to do his work and, on April 3, 2000, Petitioner was recommended for placement at the District's alternative school.

15. On April 4, 2000, Petitioner began attending the District's alternative school. The alternative school class in which Petitioner was placed had approximately ten to fifteen students in the fourth, fifth and sixth grade, all of whom were

taught by one teacher. Petitioner completed the 7th grade at the alternative school and he was recommended for the alternative school for the 8th grade.

16. Petitioner began the 8th grade in a new alternative school operated by the Respondent School District. He had one teacher for the entire school day, there were approximately 10 students in his class and he was not assigned after-school homework. Petitioner was considered by his teacher (who is also the alternative school director) to be respectful and trustworthy and he applied himself in math and science to achieve the major objectives. Petitioner's first semester grades were three AB@, two AC@ and a AD+@. At the end of the second semester, Petitioner's grades were four AC@, one AB@ and one AD@. During the 8th grade year at the alternative school, Petitioner was late to school 22 times and he was absent 27 days. As an accommodation to Petitioner, the teacher allowed him to turn in work late and he was given an opportunity to catch up in his work. During the 8th grade, Petitioner showed a Apassion@ for football and, at the end of the school year when Petitioner's performance was being evaluated, he was encouraged to participate in extra-curricular activities such as football Athat will motivate to achieve better attendance@. Petitioner was recommended to attend regular high school for his 9th grade.

17. Petitioner enrolled in the regular high school within Respondent School District for the 9th grade. Because of the change in Petitioner's educational environment, Petitioner's mother contacted the high school assistant principal in charge of 504 accommodations, seeking assistance for Petitioner. The assistant

principal knew that Petitioner was motivated about playing football and that he looked forward to coming to the high school.

18. Upon Petitioner's arrival on campus, the assistant principal discussed Petitioner's medical condition with Petitioner's teachers and he asked them to determine what Petitioner's needs were. The assistant principal thought that, in advance of a student study team meeting about establishing a formal plan, Petitioner would be observed over a nine week period during the first semester and that each teacher would accommodate Petitioner in a manner that the teacher believed was needed. On September 13, 2001, the assistant principal recorded accommodations to be considered by the teachers and he wrote A Petitioner [name deleted] has had difficulty getting up and attending school, especially in the mornings due to his medicines for his conditions of ADD and bipolar. He has demonstrated behaviors that can effective (sic) his learning, such as difficulty understanding and noting directions for assignments/homework. He is (sic) current medication appears to assist him to be successful in the learning process. He is currently playing freshman football successfully, which is adding to his current success at school. Our goal is to be aware of his current medical condition and provide accommodations to assist him@.

19. Petitioner played freshman football during the first semester. Periodically during the nine week observation period, the assistant principal saw Petitioner in the classroom and outside of the classroom. The assistant principal thought that

Petitioner was doing well during the first semester and, on November 1, 2001; the assistant principal reviewed the accommodations that were being offered by the teachers to see what was working and what was not working. Football season had ended for Petitioner on October 24, 2001. The Student Study Team meeting was set for November 21, 2001.

20. In anticipation of the Student Study Team's meeting on November 21, Petitioner's physician wrote a letter 'To Whom It May Concern' in which he recounted Petitioner's medical conditions of bipolar disorder and ADHD, he concluded that 'Given the medical impairment of his condition, and limitations of his treatment, his educational performance is adversely affected. This is a chronic medical condition that severely limits Petitioner's [name deleted] alertness, attention, and concentration. This ultimately adversely affects his educational performance. Under these circumstances he meets criteria for special education and/or related services under both IDEA (including the IDEA 'Other Health Impaired' category), and under Section 504. This is based on his medical and mental health impairment, which substantially limits his major life activity of learning...I support the development of a 504 Plan for Petitioner [name deleted], with these principals (sic) in mind: First, a specific problem list needs to be developed; then, specific accommodations should be initiated to correct/support each problem; then, a method and time frame needs to be designated as to how and when outcome will be measured. Ultimately, some accommodations may need to be modified if specific problem areas are not

remedied within a two-four week time period@.

21. On November 21, 2001, the Student Study Team met to consider a formal 504-accommodation plan for Petitioner. The meeting was attended by Petitioner's parents, Petitioner's parents' advocate, the assistant principal, a counselor and two of Petitioner's teachers. The Student Study Team listed Petitioner's difficulties as A Petitioner [name deleted] has had difficulty getting up and attending school. Except during football this year, the mornings have been difficult due to his medicines for ADD and Bipolar. He has demonstrated learning effects such as difficulty understanding and noting directions to assignments/homework (excessive daytime sedation)@.

22. The Student Study Team created formal accommodations for Petitioner. These included 1) extended time for completion of assignments and clarifying details. Assign positive peer support for labs and group projects. Petitioner [name deleted] is able to stay after class in Science; 2) assist with study skills and organization of assignments, notes, ad materials, dictation, etc. (back up notes as needed); 3) adjustment of long assignments into smaller segments and monitoring completion of each part. Assist with directions through hand-outs or outlines for projects; 4) Petitioner [name deleted] has difficulty with motivation B he goes through swings in his production and will need support due to medical conditions/treatment. Exception to tardy policy especially 1st hour; 5) based on past/current medical issue a referral to SST for further ed review will be done (OHI in IDEA); and, 6) teacher will

reduce % of weighted grades for homework production. Petitioner [name deleted] will be encouraged to complete assignment in class and given support to do so. The Student Study Team also recommended that Petitioner continue in sports because he has many friends that encourage his success. The Student Study Team also noted that Petitioner [name deleted] has demonstrated an increased interest in school.

23. Approximately one month after the Student Study Team met, the first semester ended. At the end of the first semester of the 2001-2002 school year, Petitioner's grades were two ABs, one AC and two ADs.

24. Because the Student Study Team's accommodation plan in November 2001 included a referral to the SST for consideration of special education, a meeting was arranged to consider Petitioner's eligibility for special education services. A meeting of the Student Support Team was held on January 10, 2002. Petitioner's mother was unable to attend the meeting but she asked that the meeting proceed in her absence. The meeting was presided over by the Respondent School District's lead psychologist and the meeting was attended by the high school assistant principal, the special education director, a counselor, a nurse and two of Petitioner's teachers.

25. The teachers presented information about Petitioner's performance in their classrooms. The teachers reported that Petitioner was absent and tardy for his first hour class but they reported that Petitioner has excellent interpersonal skills with

adults and peers@. The science teacher reported Petitioner's performance as AInconsistent@ but he was described as a Acapable student@. The team had available to it the March 2000 evaluation from the educational diagnostician and the clinical psychologist which they reviewed at the Student Support Team meeting. The team members noted that Petitioner's grades in elementary school were primarily AB@ and AC@ and that his Stanford scores were average to low average throughout the years. Petitioner's 9th grade results were reviewed and the teachers reported that Petitioner's grades declined after the football season ended. The team also reviewed the accommodations that were put into place in November 2001.

26. Based on the team's review, the team concluded that Athe classroom teachers are not identifying a need for special education services and parent is reporting that the student is not interested in special education. The team recommended that 1) Petitioner [name deleted] visit the special education department chair to obtain information about special education; 2) discuss the possibility of no class first hour with the parent since Petitioner [name deleted] is absent or tardy 68% of the time; 3) participation in sports to motivate in academics; 4) continue to monitor academic performance; and, 5) continue with classroom interventions per 504 plan.

27. On that same date, a Prior Written Notice was issued declining to initiate any placement changes for Petitioner.

28. On January 17, 2002, Petitioner was suspended from school for 10 days

with the intent to expel him from the Respondent School District for conduct in violation of the Student Code of Conduct.

29. Following the suspension, Petitioner's parents requested a due process hearing to prove that Petitioner is a student with a disability and is therefore entitled to the protections and procedural safeguards regarding discipline. They sought an independent evaluation to determine whether Petitioner qualifies for special education services. Petitioner was assigned to the Respondent School District's alternative school while the independent evaluation was undertaken.

30. While Petitioner was enrolled in the alternative school, he was taught by two teachers and he earned average grades. At the end of the semester in May 2002, Petitioner's grades were two AB, one AC, one AD and one AA. Petitioner was considered a pleasant young man, he was not disruptive at school and, behaviorally, he excels. Throughout Petitioner's interim placement at the alternative school, he continued to have trouble getting up in the morning.

31. From the list of evaluators provided by the Respondent School District, Petitioner's parents selected a psychologist [name deleted] to perform the independent evaluation. The psychologist selected by Petitioner's parents was the same psychologist who performed a portion of the March 2000 evaluation. The psychologist [name deleted] performed the independent evaluation on March 27, April 22 and May 3, 2002.

32. The psychologist reviewed Petitioner's records, he interviewed Petitioner

and Petitioner's mother, he interviewed Petitioner's physicians, he interviewed Respondent School District staff members, including two of Petitioner's regular high school classroom teachers and he administered the Child Behavior Checklist, the Youth Self-Report Form and the Behavior Rating Inventory of Executive Functions. The psychologist described Petitioner's first semester of the 9th grade as a Petitioner's [name deleted] performance during the first part of the ninth grade was quite positive. Petitioner [name deleted] became involved with the high school football team, seemed upbeat and positive in his mood, and had few absences or tardies. His test scores and grades were in the high B range, all homework was completed, and any time missed was made up. Once football ended in October of 2001, however, Petitioner [name deleted] began to have more absences, more tardies (anywhere between one and three minutes), seemed to be sleeping in class more, and although he was felt to understand and know material taught in class, often didn't turn in written assignments@. The psychologist acknowledged the Section 504 accommodation plan adopted in November 2001 and he recited the results of the Student Support Team meeting on January 10, 2002. He referred to the incident, which resulted in Petitioner's suspension and Petitioner's reassignment to the alternative school as a result. The psychologist did not interview Petitioner's teachers at the alternative school.

33. The psychologist presented findings of his evaluation, including

Petitioner's medical condition and medications and he noted ΔPetitioner [name deleted] is presently experiencing a significant level of impairment in his capacity to perform in school secondary to an exacerbation of his mood disorder and his ongoing difficulties with symptoms of ADHD@, he noted a referral to a cardiologist because Petitioner had reported that he was >passing out', he noted that Δmembers of the high school [name deleted] faculty report a consensus opinion that Petitioner [name deleted] does not present any specific disciplinary concerns. Petitioner [name deleted] has never been referred for behavior problems to the assistant principal for the freshman class. Teacher comments suggest that Petitioner [name deleted] is viewed as polite, mature and respectful. Petitioner [name deleted] is felt to have many friends, and to get along well with other students. The faculty members felt that Petitioner [name deleted] showed no indications of a >Severe Emotional Disturbance'@, he noted Petitioner's reported conduct disorder and discussed the incident which led to Petitioner's suspension, he wrote ΔPetitioner's [name deleted] mood control is variable and prone to times of increased and reduced levels of depression. Petitioner [name deleted] realizes that his Bipolar disorder is the root cause of his mood swings, and realizes that he must take his medication to achieve better mood control. He does not like the effects of the medications, however, noting that they cause him to feel as if he cannot release his emotions, which become bottled up inside of himself. While playing football, Petitioner [name deleted] was able to release his aggressive emotions in a socially acceptable manner. The regular

environmental structure, routine, physical exercise and self-esteem enhancement associated with participation on the football team resulted in improvements in both Petitioner's [name deleted] overall mood and also in terms of a reduction in the symptoms associated with his ADHD. This pattern of findings is well documented in the scientific literature on the treatment of psychiatric illness. With the end of football, however, Petitioner's [name deleted] symptoms began to re-emerge at a more significant level. He notes that he began to have increasing difficulty sleeping and was consequently unable to awaken easily in the morning and experienced excessive daytime sleepiness (causing him to fall asleep in class). He found that he had decreasing levels of motivation, decreasing capacity for attention and concentration, and decreasing levels of motivation, decreasing capacity for consequences of his choices (i.e. whether or not he did or turned in homework)@, he noted increasing despondency and depression since placement in the alternative school and he noted that Petitioner satisfies the criteria for two categories of disability under law, i.e. severe emotional disability and other health impairment. The psychologist recommended that Petitioner be classified as disabled as emotionally disabled and other health impaired disabled, that he should have an IEP Ato increase the level of services for which Petitioner [name deleted] is eligible, as well as to increase accountability and documentation by all involved@, that he should receive his education in the least restrictive environment and that a transition plan be initiated.

34. The Lead Psychologist reviewed the psychologist's report. She and the Special Education Director then wrote to the psychologist asking for the raw test data for his evaluation of Petitioner. On May 10, 2002, the psychologist wrote to the Lead Psychologist and Special Education Director. He attached his test scores from the evaluation and, as to his belief that there was an adverse educational impact, he reviewed his findings from the prior evaluation in March 2000 as well as the test results from the 2002 evaluation and he wrote that AI believe that Petitioner's [name deleted] educational progress is being impeded as a consequence of the aggregate and interdependent effects of his multiple areas of impairment. The findings of the Student Support Team were that 504 plan accommodations that had been implemented were not fully successful in addressing Petitioner's [name deleted] needs. In sum, Petitioner [name deleted] has a history of being identified and treated for several health impairments and disabilities. He has a history of inconsistent academic performance that is tied to the fluctuations in successful management of his disabilities. Attempted accommodations under Section 504 of the Americans with Disabilities Act have been insufficient to remediate his needs. In my professional opinion, Petitioner [name deleted] requires special education services in order to increase the level of intensity and accountability of efforts made by both Petitioner [name deleted] and the school system@.

35. The psychologist's report and addendum were reviewed on May 15, 2002. The Student Support Team concluded that the psychologist's report was insufficient

to support Petitioner's eligibility for special education because the Team felt that there was no educational impact shown by the psychologist, that the testing was inadequate since only Petitioner and his mother were the reporters of information, that the psychologist was incorrect about the persistence of Petitioner's tardiness unrelated to football, that the psychologist was incorrect about Petitioner's grades and his educational performance since his suspension as well as about Petitioner turning in assignments and that the psychologist was incorrect about the success of the 504 accommodations in place for Petitioner.

36. The Student Support Team found that Petitioner was not eligible for special education. In its report of the May 15 meeting, the Student Support Team wrote that the high school staff reported that Petitioner ~~was~~ learning in the regular education classroom with 504 accommodations...Petitioner [name deleted] demonstrated appropriate relationships with peers and adults. There were no disciplinary referrals prior to the incident in January 2002. Teachers reported no inappropriate behaviors under normal circumstances nor any behaviors indicative of sadness. They reported that Petitioner [name deleted] was pleasant, well-liked and appropriate with adults and peers. The alternative school director [name deleted] reported that since Petitioner's [name deleted] return to the alternative school [name deleted] he has been even more motivated than he was during his eighth grade year to achieve academically. He is passing his classes and completing assignments. He interacts regularly in a socially appropriate manner with peers and staff. There have

been no comments of '>wanting to die' or anything related to sadness or feelings of unhappiness. His facial expression is not one of sadness, and he is not withdrawn. He is able to attend and focus on his assignments. He is achieving academically in the regular classroom setting@. The report concluded - The team concludes that Petitioner [name deleted] has been successful in the regular education classroom setting with 504 accommodations for the identified disabilities. Special education services are not needed at this time since behavior and academic interventions can be implemented within the regular education classroom setting. Petitioner [name deleted] is making satisfactory progress in the regular education classroom as documented by standardized test scores, classroom grades and teacher report. Petitioner [name deleted] is able to make satisfactory progress in the general curriculum without special education and related services. As such, he is not eligible as a disabled student under IDEA@.

37. The Prior Written Notice provided to Petitioner's parents following the May 15 meeting informed them that the Respondent School District did not intend propose to initiate identification or placement for special education.

38. Petitioner's parents disagreed with the Student Support Team's conclusions and an evidentiary hearing was then set to consider whether Petitioner is eligible for special education services. The evidentiary hearing was held on August 14, 15 and 16, 2002.

39. Sometime before the May 15, 2002 Student Support Team meeting,

Petitioner sat for the AIMS testing and his scores were very poor. The Student Support Team did not consider the AIMS scores in deciding whether Petitioner needed special education services. Sometime after the May 15, 2002 Student Support Team's meeting, the results of Petitioner's 9th grade Stanford 9 testing were received. Petitioner did extremely poorly on the Stanford testing and his scores were mainly below average.

CONCLUSIONS OF LAW

1. Petitioner is entitled to a public education within the least restrictive environment.
2. All due process rights to which Petitioner and his parents are entitled have been provided.
3. All notice requirements to which Petitioner and his parents are entitled have been provided by the Respondent school district.
4. Insufficient evidence exists in the record of this matter on which to conclude that Petitioner needs special education services based on his identified disability of other health impaired as, from the totality of the evidence presented, Petitioner does not need specially designed instruction or modification of the curriculum or adaptation of the course of study in order to gain educational benefit.
5. Insufficient evidence exists in the record of this matter on which to conclude

that Petitioner suffers from an emotional disability, as, from the totality of evidence presented, Petitioner does not demonstrate the characteristics of an emotionally disabled student. Petitioner has not displayed conditions exhibiting an inability to learn that cannot be explained by intellectual, sensory or health factors, an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, inappropriate types of behavior or feelings under normal circumstances, a general pervasive mood of unhappiness or depression or a tendency to develop physical symptoms or fears associated with personal or school problems to a marked degree, over a long period of time or that adversely affects his educational performance, all of which is required under the definition found in ARS ' 15-761 (5) and 34 CFR 300.7 (c)(4).

6. Petitioner is entitled to a public education in the least restrictive environment and is entitled to receive a regular education in the regular classroom together with accommodations and assistance to accommodate his disabilities.

7. Based on the evidence presented at this hearing, Petitioner is making progress in his education and is receiving educational benefit with accommodations under a 504 Plan.

8. The Respondent School District reasonably concluded that the independent evaluation submitted by the psychologist in May 2002, together with the supplement dated May 10, 2002, was an inappropriate evaluation for the purpose of finding Petitioner eligible for special education services.

9. The request by Petitioner's parents for a finding that Petitioner is eligible for special education services is not supported by a greater weight of the evidence. Evidence showing that special education services are not needed is supported by a greater weight of the evidence.

10. Respondent School District is the prevailing party in this matter.

HEARING OFFICER'S DECISION AND ORDERS

It is the decision of the undersigned hearing officer that the due process request of Petitioner's parents is DENIED. Petitioner is not entitled to receive special education services under IDEA.

This due process request presents difficult questions, foremost among them, deciding whether Petitioner's disability should be mitigated through IDEA-mandated special education services or through Section 504 accommodations. Additionally, this matter requires a resolution of whether the Respondent School District deprived Petitioner of the right to be evaluated for special education services such as to require remedial and compensatory services.

There is no dispute that Petitioner is a student with a disability. From history and through professional evaluation, Petitioner suffers from bipolar disorder for which he receives medication and treatment. Petitioner's psychiatrist has also classified Petitioner as suffering from attention deficit hyperactivity disorder. As a

disabled student, Petitioner is entitled to assistance from the Respondent School District and he is entitled to be evaluated for his disability in order to determine the most appropriate form for assisting him.

This due process request, however, truly presents a conundrum. From Petitioner's grades and from his classroom teacher reports, he is making satisfactory progress in the general curriculum. From the reports of his physician, the psychologist and his parents, he is struggling and his educational performance has been adversely affected. Resolution of the competing views expressed in this due process hearing in order to decide the form of assistance to which Petitioner is entitled requires a determination of whether Petitioner requires specialty instruction to overcome the consequences of his disability or whether accommodations to regular instruction allows Petitioner to transcend the performance deficiencies noted by school district personnel.

The beginning point of analysis is the definition of Aspecial education@. The Arizona statute that defines Aspecial education@ reads A...means the adjustment of the environmental factors, modification of the course of study and adaptation of teaching methods, materials and techniques to provide educationally for those children who are gifted or disabled to such an extent that they need specially designed instruction in order to receive educational benefits. (ARS ' 15-761 (31). The regulations to IDEA define Aspecial education@ as A...means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child

with a disability@ (34 CFR 222.50).

Even though a student may be disabled, unless a student is found to need special education services and 'specially designed instruction' (not just related services), eligibility under IDEA cannot be endorsed. Given that Petitioner has satisfied the first portion of the test for eligibility, i.e. being a student with a disability, the question for this due process hearing is whether, based on the professional evaluations performed and based on the Respondent School District's analysis of Petitioner's circumstances, Petitioner needs a special education@. The undersigned believes that the answer is that Petitioner is entitled to 504 accommodations but, because he does not need specially designed instruction in order to receive educational benefits, he is not entitled to special education services under IDEA.

Equally important as professional opinions are the observations and reports of those who work with Petitioner throughout the year. Those observational reports from Petitioner's teachers deserve at least equal weight to the professional opinions rendered on behalf of Petitioner and those teacher observations must be balanced against the professional assessments. Indeed, Petitioner's moods at school and his emotional ability to learn while in school are best demonstrated by observations of the classroom teachers. In fact, only classroom teachers can report whether Petitioner's disabilities prevent him from learning in the general curriculum and with regularly designed instruction.

Subjective observations are not the sole method for determining Petitioner's

progress in school; the objective evidence of his grades is available to show whether he is making educational progress. Measuring Petitioner's grades against his general abilities is another indicator of whether progress is being made. Additionally, the non-grade component of educational progress, i.e., the emotional ability to learn can be measured by disciplinary referrals and recorded behavioral accounts.

Petitioner suggests that, when a student is suspected of being disabled, the school district is responsible for first determining eligibility for special education and, if such eligibility is not found, then, whether accommodations must be offered to the student. IDEA-based special education and Section 504 accommodations are not mutually exclusive and eligibility for services under one law is not the counterpoint of the other. Pre-supposition of eligibility under either law is not permitted and a broad evaluation process is required to appraise the student's needs. Therefore, a special education evaluation need not precede a Section 504 evaluation and, indeed, considerations of least restrictive environment militate in favor of determining accommodations before deciding that special education services are necessary.

Respondent School District has established such an evaluation hierarchy and no violation of law is committed when the District elects not to pre-suppose eligibility for special education when a disabled student presents himself/herself. In order to comply with State statutes and regulations, the Respondent School District is required to evaluate the student's needs based on relevant information available to it and the Respondent School District's protocol for evaluating limitations and

deficiencies as part of a Student Study Team meets the threshold evaluation requirements under law.

Petitioner asserts that, once it identified Petitioner as a disabled student, the Respondent School District was obligated to seek a complete evaluation to be able to offer special education services. Petitioner contends that, when Petitioner's mother sought an evaluation while Petitioner was in the 7th grade, the Respondent School District had a duty to determine his eligibility for special education and then offer special education services as determined by such evaluation.

The undersigned is not persuaded that a comprehensive special education evaluation was initially necessary when Petitioner's disability manifested itself to school staff. Overlaying Petitioner's difficulties at school were his pediatrician's inability to regulate Petitioner's bipolar disorder medications. In addition, the difficulties Petitioner was experiencing that related to his bipolar disorder did not immediately suggest the need for special education services. Instead, the Student Study Team charted Petitioner's limitations and created an accommodation plan as an initial step for determining Petitioner's needs. Nothing thereafter, until Petitioner's hospitalization, connoted the need for a more comprehensive evaluation.

The evaluation conducted in March 2000, after Petitioner's hospitalization, is significant. Petitioner was at the nadir of his emotional state yet the evaluators did not recognize or articulate a need for special education services at that time. At most, Petitioner was identified as At risk and he was then placed at the alternative

school. If the Respondent School District violated any of Petitioner's procedural safeguards prior to the date of that March 2000 evaluation, the effects of any such violations were innocuous and would not have resulted in any deprivation to Petitioner's rights to the adoption of an IEP or the provision of any special education services (especially since none were indicated as needed), see Amanda J v. Clark County School District, 267 F3rd. 877 (2001).

For the remainder of the 7th grade, throughout the 8th grade and into the 9th grade, the objective and subjective evidence that might have indicated a need for special education did not exist. Petitioner continued to receive average to low-average grades, he performed in the low average percentiles for standardized tests, he was expected to perform within the regular curriculum and he was obtained educational benefit in the regular curriculum. Throughout this period, Petitioner was accommodated under a Section 504 plan that took into account his lassitude during the morning hours, that adapted homework assignments, that extended time for completing assignments, that offered assistance in organization and skill development, that tried to enhance his motivation and that conciliated the need for additional time (including after school assistance). None of these accommodations allowed Petitioner any concessions such that he required A specially designed instruction in order to receive educational benefit@.

Even when the 2000 evaluation was considered in January 2002 by the Student Support Team after special education services were requested at the

November 2001 accommodation meeting, there was insufficient information on which to base any conclusion about Petitioner's need for special education (including the recent psychiatrist's report and the advocate's information). Indeed, Petitioner expressed a lack of interest in special education and his disinclination was reported to the Student Support Team as well. As of January 10, 2002, no demonstrated need for special education services was evident.

The linchpin for evidentiary support of Petitioner's special education eligibility therefore, rests on the most current evaluation performed by the psychologist in March, April and May 2002. Since none of Petitioner's teachers reported deficiencies that would require special education services for Petitioner, since Petitioner's grades were highly correlated with his abilities and since Petitioner did not display any anti-social or inappropriate actions (except for the disciplinary action in January 2002), as of February 2002, there was insufficient evidence on which to base any conclusion about the need for special education and therefore, when an independent evaluation was sought, everyone awaited the professional's opinion about the need for special education services.

That evaluation by the psychologist did not impress the Student Support Team and the undersigned was not swayed by either the psychologist's conclusions or his recommendations. When asked at the hearing what special education services should be included in an IEP if Petitioner is declared eligible, the psychologist's focus of those services amounted to nothing more than accommodations which are

already available under Section 504. In fact, the psychologist's conclusions were generalized and spoke to an increase in the level of services, increase accountability and documentation. One is left to ponder the meaning of those written recommendations but, even when the psychologist supplemented his recommendations through oral testimony at the due process hearing, the recommendations were no more than the existing accommodations for planning and organization, task completion and coaching.

Those recommendations alone demonstrates the reasonableness of the Student Study Team's rejection of the psychologist's recommendations for special education services as an inappropriate evaluation. When one also realizes that the psychologist's opinions were based on incomplete and inaccurate information (representations about the effect of Petitioner's participation in freshman football were erroneous), the recommendations have even less relevance to considering Petitioner's eligibility for special education.

Respondent School District has the burden of proving that the evaluation(s) supporting eligibility for special education are inappropriate. The undersigned believes that the Respondent School District has met its burden of proof. Neither the March 2000 evaluation nor the psychiatrist's November 2001 letter are sufficient to support eligibility for special education services. The independent psychological evaluation performed in March, April and May 2002 does not convey sufficient information on which to support Petitioner's eligibility for special education services

and the Student Support Team reasonably rejected the psychologist's recommendations as inappropriate.

It would have been easier for the Student Support Team to declare Petitioner eligible for special education and avoid this due process hearing. It would have been easier for the Student Support Team to conclude that the accommodations offered to Petitioner could be duplicated as IEP goals and objectives. It would have been just as easy for the Respondent School District to monitor Petitioner's educational performance through an IEP as a Section 504 accommodation plan.

The facility for avoiding controversy is not the touchstone for determining whether Petitioner should be accommodated under a Section 504 plan or provided special education services through an IEP. The undersigned believes that, if services can be provided equally as special education services and non-IDEA services, the least restrictive offer for those services exists outside of the IDEA umbrella and should be preferred. As to the circumstances presented in this due process hearing request, Petitioner is entitled to accommodations giving him access to the general curriculum on the same basis as non-disabled students but he does not need special education services in order to make equivalent educational progress. Adverse educational performance can be adequately addressed through accommodations for time management, organization, planning, homework, tutoring, additional teacher time and the like. However special education services have been identified for purposes of this due process request, they add nothing to the services

currently available to Petitioner and therefore the request to declare Petitioner eligible for special education services is denied.

Very little guidance exists in case law or U.S. Department of Education interpretations regarding initial eligibility under IDEA vs. accommodations under Section 504 of the 1973 Rehabilitation Act. The authorities cited by Petitioner do not support the conclusion that Petitioner is entitled to be provided services through IDEA. While the Respondent School District was obligated to protect Petitioner's and his parents' procedural rights, Amanda J. v. Clark County School District, 267, F3rd, 877 (9th Circuit), remediation for any deprivation of procedural rights will not be considered unless a nexus to the student's rights to services under IDEA is established. In this case, the seminal March 2000 evaluation failed to identify a need for special education services and therefore, the undersigned concludes that any procedural irregularity that may have been committed by the Respondent School District prior to March 2000 is *de minimus* at best. After the March 2000 evaluation was performed, one must wonder what the Respondent School District was expected to do since special education services were not recommended for Petitioner. Unquestionably, as of March 2000 Petitioner had been identified as a student with a disability B the Respondent School District's interventions for that disability extended to making Section 504 accommodations for Petitioner's disability.

Petitioner's enrollment in the regular high school for the 9th grade presented challenges, which were not encountered in earlier grades. Respondent School

District knew about and recognized Petitioner's disability even before school started and Petitioner's disability was addressed from that moment. Even though there was not a formal accommodation plan adopted in September and October, Petitioner's teachers were providing accommodations to Petitioner to ameliorate the very disabling conditions that eventually were incorporated into Petitioner's formal 504 accommodation plan. Unfortunately, success under the Section 504 accommodation plan did not have an opportunity to be evaluated before Petitioner was suspended for a disciplinary infraction.

Throughout the 7th, 8th and 9th grades, despite the decline in Petitioner's Stanford 9 scores (and his abysmal performance on the AIMS test), his classroom grades approximated his abilities, the teachers' observations supported accommodations over special education services and there were no emotional issues that prevented or limited Petitioner's ability to progress in the general curriculum. Incremental adjustment of the accommodations put into place to assist Petitioner, instead of creating an IEP reflecting the same services, was a reasonable approach by the Respondent School District.

Petitioner's reliance on the Muller v. Committee on Special Education of the East Islip Union Free School District, 145 F3rd. 95 (1998) case does not support Petitioner's conclusions about Petitioner's eligibility for special education. The factual situation is dissimilar enough to discount its analogy to Petitioner's situation. Unlike Ms. Muller, Petitioner was hospitalized only once when he was in the 7th grade (and

before the evaluation that did not find the need for special education services). Unlike Ms. Muller, Petitioner has not failed any classes and there is no evidence that he was socially promoted to the 9th grade. The elements necessary to support a diagnosis for an emotional disability do not apply to Petitioner and all school officials' observations do not demonstrate any inappropriate behaviors at school (other than the January 2001 disciplinary issue). In addition, there is a paucity of evidence to show a marked condition of depression or unhappiness at school and his medications have been stable for a lengthy period of time.

Petitioner's comportment at school does not show any behavioral limitation or aberration such as to conclude that Petitioner needs special education. He is described as a happy student who has many friends, he is described as a student who relates well to his peers and teachers and there is no objective evidence, in the form of disciplinary referrals, to show any depressive or anti-social emotional constraints to his educational performance. In fact, the dominant evidence reflects Petitioner's enjoyment of school and his engagement with peers and teachers, all of which are contraindications of any claim about pervasive unhappiness or an inability to learn.

At most, Petitioner's limitations are due to his medications' effects and the lingering lack of motivation to complete homework assignments (remarkably, the psychologist did not note any of these deleterious effects while Petitioner was playing football), all of which has been and can be accommodated by the

Respondent School District (elimination of a first hour period, breaking assignments down into smaller segments, no after-school homework, after-school assistance from teachers and tutors, peer assistance during school hours). Classification of petitioner's accommodations as special education services will not provide any greater degree of extenuating Petitioner's disabilities (except for the disciplinary implications of expulsion vs. alternative school).

Notwithstanding Petitioner's argument that the District had no choice but to include Petitioner as a special education student when his disability was identified, the facts of this matter do not show that the Respondent School District blithely made an election of Section 504 accommodations over special education services. In fact, the evidence shows that team meetings were held in November 2001, January 2002 and May 2002, all of which resulted in the concordant decision that Petitioner does not need special education services. School District preference was not demonstrated during the hearing as a factor for deciding the appropriate interventions for Petitioner.

Petitioner also argues that the creation of Section 504 accommodations, *ipso facto*, amounts to a specialized education, which immediately qualifies Petitioner as an IDEA student. The undersigned believes that, notwithstanding the testimony of the psychiatrist, psychologist and advocate, the interventions that Petitioner needs do not rise to the level of a specialized instruction. Petitioner is not expected to do any less work than other students in his classes and Petitioner is expected to meet

the demands of the regular, unmodified curriculum. If goals and objectives were to be set for Petitioner, those goals would be identical with the goals of all of Petitioner's non-disabled peers. Nothing can be set as a goal for Petitioner, which would rouse him from his early morning torpor or energize him to complete afternoon homework. The only avenue for intervention, therefore, is to accommodate Petitioner's medical infirmities, which hopefully, will have the salutary effect of allowing Petitioner to complete all of the expected assignments.

From the totality of evidence presented, the undersigned concludes that the academic assistance and accommodative services available to Petitioner provide an adequate avenue of support for him to progress. Reliance on IDEA special education identification to provide those same services is inconsistent with concepts of least restrictive environment and, since the evidence does not support the need for special education services, the due process hearing request seeking Petitioner's eligibility as a special education student must be denied.

APPEAL RIGHTS

THIS DECISION IS A FINAL DECISION. Any party aggrieved by this decision may file an appeal with the Arizona Department of Education, Exceptional Student Division, 1535 West Jefferson, Phoenix, Arizona, within thirty-five (35) days following your receipt of this decision.

DATED this 22nd day of October 2002

HAROLD J. MERKOW
Due Process Hearing Officer